ENVIRONMENTAL ENFORCEMENT ON TRIBAL LANDS
Congressional Authority and Major Case Law

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OUTLINE

1. Introduction

Effective environmental enforcement requires the ability to regulate comprehensively in Indian Country, without regard to land ownership or tribal enrollment. The authority of a tribe over its members is clear, but tribal jurisdiction over nonmembers is often contested. Because the extent of governmental jurisdiction is controversial everywhere, it is not surprising that the civil jurisdiction of tribal governments is a controversial and evolving topic. This paper will principally examine congressionally authorized exercises of tribal authority in the environmental regulatory field.

2. Jumping to the *Montana* Exceptions: The Narrowing of Inherent Sovereignty As a Basis for Tribal Regulation of Nonmembers.

In *Montana v. United States*,[1] the Supreme Court established the benchmark for determining tribal authority over nonmembers.[2] This inquiry requires that three bases of tribal authority be examined: (1) express congressional delegation, (2) taxation, licensing, or other means [regulating] the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements, or (3) conduct of non-Indians on fee lands within [the] reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. [3]

Tribal civil jurisdiction over nonmembers has been strongly linked to the concept of inherent tribal sovereignty as articulated in *Montana v. United States*.[4] In particular, two of the exceptions to *Montana's* general rule, the consensual relationship exception and the threatening conduct exception, have come to be known as *Montana* Exceptions 1 and 2. It is important to recognize that reliance on these exceptions oversimplifies both the *Montana* decision itself and current federal common law on tribal civil jurisdiction over nonmembers. Moreover, recent Supreme Court opinions[5] do two things: First, they narrow practically to vanishing point the situations in which a tribe has *inherent* civil regulatory authority over nonmembers under the second *Montana* exception. Second, the opinions cast doubts on tribal inherent civil regulatory authority over nonmembers on tribal land. The result of these two opinions is that the first or second *Montana* exceptions probably must apply for a tribe to use inherent powers to regulate nonmembers even on trust land.

The attenuation of inherent tribal sovereignty in U.S. Supreme Court jurisprudence is a subject of other papers and is touched upon in the discussion below concerning the Court's two major tribal jurisdiction decisions in 2001. The confused and increasingly narrow application for inherent tribal sovereignty makes it important to consider available statutes authorizing or delegating powers to Indian tribes. The predictable resistance to tribal environmental authority warrants basing that authority on statutory authorizations or delegation, rather than inherent authority supported by the two *Montana* exceptions.

3. Reexamining the First Part of the *Montana* Test: Congress Has Authorized Tribes to Exercise Certain Authorities.

When attempting to establish tribal authority over nonmembers, the tendency has been to focus on the *Montana* exceptions. However, as our following review of cases illustrates, the Court has repeatedly recognized and acknowledged congressional authorization or delegation as an alternate basis for tribal authority over nonmembers.

a. *Mazurie* and the ' 1161 (Liquor Ordinance) Authorization.

The leading case on delegation to tribes of authority over non-Indians is *United States v. Mazurie*.[6] The Mazuries operated a bar on fee land within the Wind River Reservation in Wyoming. They were denied a tribal liquor license by the tribe under its option to regulate the introduction of liquor into Indian Country. The United States prosecuted them and obtained a conviction for violating 18 U.S.C. ' 1154. The *Mazurie* opinion focuses on the phrase in ' 1154 exempting fee-patented lands in non-Indian communities within Indian reservations from the Indian liquor laws.

For our purposes the important statute is 18 U.S.C. ' 1161. This provision is a 1953 congressional local-option act that authorizes tribes, with the approval of the Secretary of the Interior, to regulate the introduction of liquor into Indian Country (so long as state law is not violated). Section 1161 exempts from federal prosecution acts Ain conformity . . . with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian Country, certified by the Secretary of the Interior, and published in the federal register. Note that this statute does not directly delegate authority to any tribe nor expressly approve any particular tribe's ordinance. However, it makes clear that tribal liquor ordinances, duly adopted, certified by the Secretary of the Interior, and published in the Federal Register will have legal effect for federal criminal law purposes.

In Part IV of its opinion the Court held that Congress has the power to delegate its authority to tribes.[7] Although the Court noted cases limiting the authority of Congress to delegate its legislative power, discussed below, it upheld the delegation in ' 1161 as follows:

> [W]hen Congress delegated its authority to control the introduction of alcoholic beverages into Indian Country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life. Clearly the distribution and use of intoxicants is just such a matter. We need not decide whether this independent authority is itself sufficient for the tribes to impose Ordinance No. 26. It is necessary only to state that the independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority to regulate Commerce . . . with the Indian tribes. *Cf. United States v. Curtiss-Wright Export Corp.*, [299 U.S. 304 (1936)].

> The fact that the Mazuries could not become members of the tribe, and therefore could not participate in the tribal government, does not alter our conclusion.[8]

Mazurie is a landmark case. It upholds the authority of Congress to authorize tribes to exercise jurisdiction over non-Indians when those matters affect the internal and social relations of tribal life. [9] It imposes no requirement that a tribe possess inherent sovereignty over a subject in order to support congressional delegation; to the contrary, as the interpretation of the *Montana* exceptions have shown, the tests for inherent sovereignty are much narrower than Congress' ability to authorize tribal authority.[10]

b. *Montana* and the Possibility of ' 1165 Delegation.

Montana v. United States[11] construed both the Crow treaties and 18 U.S.C. ' 1165 as possible sources for the Crow Tribe's power to regulate non-Indian hunting and fishing on non-Indian lands within the Crow Reservation. The Ninth Circuit had held that the federal trespass statute, 18 U.S.C. ' 1165, augmented the Tribe's regulatory power over non-Indian land.[12]

Reversing the Ninth Circuit's augmentation holding and rejecting the tribe's contention that it had inherent sovereign authority over non-Indian hunting and fishing, the *Montana* Court indicated that Congress could have authorized that authority by amending ' 1165:

> If Congress had wished to extend tribal jurisdiction to lands owned by non-Indians, it could easily have done so by incorporating in ' 1165 the definition of Indian Country in 18 U.S.C. ' 1151 . . . . Indeed, a Subcommittee of the House Committee on the Judiciary proposed that this be done. But the Department of the Interior recommended against doing so. . . .[13]

Note that the *Montana* Court's example of 18 U.S.C. ' 1165 demonstrates the difference between the showing required to satisfy the two *Montana* exceptions for inherent sovereignty and the certain degree of independent authority over matters that affect the internal and social relations of tribal life, which *Mazurie* indicates will support a congressional delegation of jurisdiction to a tribe.[14]

c. *Brendale*, *Montana v. EPA* and the Clean Water Act (' 518) Delegation**.**

Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation,[15] which was decided as an inherent authority case, is generally noted for its discussion of *Montana* Exceptions 1 and 2.

However, *Brendale* is also important for its acknowledgment of situations in which Congress has delegated authority to tribes. Justice White, who wrote the plurality opinion, commented that *Brendale* involved no contention . . . that Congress has expressly delegated to the Yakima Nation the power to zone fee lands of nonmembers of the Tribe. [16] Using the

signal *cf.* , Justice White cited four examples of express statutory delegation. The first citation is to the definition of Indian Country, 18 U.S.C. ' 1151, and the second, to the authorization of tribal liquor ordinances that were at issue in *United States v. Mazurie*.[17] The third and fourth citations are particularly important as they refer to ' 518 of the Clean Water Act.

Justice White cited two parts of the Clean Water Act in *Brendale* as examples of congressional authorization to tribes. The first subsection cited, 33 U.S.C. ' 1377(e), sets up a process by which tribes can exercise a series of important powers under the Clean Water Act if they satisfy the EPA Administrator that they meet certain conditions. The second subsection, 33 U.S.C. ' 1377(h)(1), defines Federal Indian reservation in exactly the way Indian Country is defined by 18 U.S.C. ' 1151, *i.e.*, all reservation land, notwithstanding patents and rights of way.

The Clean Water Act, as amended in 1987 to add ' 518, authorizes the EPA Administrator to treat an Indian tribe as a State if the tribe has a governing body carrying out substantial governmental duties and powers, proposes to manage water resources within an Indian reservation, and is found by the Administrator to be capable of carrying out water resource functions in a manner consistent with the Clean Water Act and its regulations. Under ' 518, tribes may exercise the same authority as states for several purposes, including setting water quality standards and issuing certification of compliance with standards, water discharge permits, and wetlands permits. Section 518 does not expressly grant any power or approve any particular tribe's ordinance. Instead it sets up a process under which the EPA Administrator can approve tribal enactments that, upon approval, become enforceable against members and nonmembers alike.

Unfortunately, the EPA has taken a narrow view of ' 518 in regulations, essentially limiting its applicability to situations in which the tribal government can show it possesses inherent sovereign authority under *Montana* Exceptions 1 and 2.[18] The difficulty posed by the regulations, however, is mitigated by their presumption that adverse effects on reservation water quality are sufficiently serious to meet the health and welfare requirement of the second *Montana* exception.

In *Montana v. U.S. EPA*,[19] the EPA's decision to grant treatment as a State (TAS) status to the Confederated Salish and Kootenai Tribes was upheld. The State of Montana used EPA's requirement that a tribe show its inherent authority as an opening to redetermine the scope of inherent authority. However, the Ninth Circuit upheld the regulation, noting that EPA had taken a cautious view of *Montana* Exception 2 and finding that the regulation reflected appropriate delineation and application of inherent Tribal regulatory authority over non-consenting nonmembers. [20] The district court would have found ' 518 by itself to be an ample delegation of federal authority.[21]

d. *Arizona Public Service Co.* and the Delegation in the 1990 Amendments to the Clean Air Act.

The major case on delegated authority with respect to air shed protection is *Arizona Public Service Co. v. Environmental Protection Agency*.[22] This case concerns a challenge to the

EPA's 1998 regulations that address the power of tribes to regulate air quality under the 1990 amendments to the Clean Air Act.[23]

The Clean Air Act amendments refer to tribal jurisdiction in several places. Tribal Implementation Plans may become applicable to all areas located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation. [24] However, tribes may be treated as states within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction. [25] The court of appeals held that Congress delegated authority to tribes to regulate all lands within reservations. Judge Ginsberg dissented, contending that Congress delegated authority only with respect to Tribal Implementation Plans because in the other provision, ' 7601(d)(1)(B), Congress failed to include the formulaic notwithstanding proviso the gold standard for such delegations. [26]

e. A Contrast: The Conclusion of No RCRA Delegation in *Backcountry Against Dumps*.

Despite the delegations of authority in the amendments to the Clean Water Act and the Clean Air Act, Congress has not always delegated environmental authority to tribes. The Resource Conservation and Recovery Act (RCRA) illustrates the uneven way in which Congress has approved the role of tribes in environmental enforcement within Indian Country. RCRA has a definition of State. [27] However, tribes are listed in the RCRA's definition of municipality. [28] As municipalities Indian tribes are eligible for federal funding to develop solid waste management and resource recovery programs and are also subject to citizen suits to enforce the revised criteria.[29]

While no court has adopted the gold standard espoused by Judge Ginsberg to uphold delegations of authority to tribes, they may be reluctant to broadly construe statutes in favor of such delegations. Such is the case in *Backcountry Against Dumps v. EPA*.[30] In *Backcountry*, the Campo Band of Mission Indians sought EPA approval of its solid waste program under 42 U.S.C. ' 6945(c), a provision that applies only to states. However, EPA approved the tribal program. The court of appeals reversed, stating A[t]his is not what the statute says. [31] The only difference between the Campo Band and states with approved solid waste facility plans was that the tribe's landfill would have to comply with the Part 258 design standards in addition to the operating standards of the regulations. The court also noted that the tribe could seek EPA approval for a site-specific regulation that would satisfy both RCRA and the tribe's desire for flexibility in design and monitoring.

f. Testing the Middle Ground: How Specifically Must Congress Authorize Tribal Enforcement?

As we have discussed, the courts have acknowledged the delegations in ' 1161, the Clean Water Act ' 518, and the Clean Air Act, on one side, and rejected a delegation in RCRA on the other. The majority in *Arizona Public Service Co.* concluded that congressional delegations do

not require any particular formula, but Judge Ginsberg's Agold standard dissent remains influential.

The question discussed in *Arizona Public Service Co.* - how specific must Congress be to authorize the exercise of tribal jurisdiction over non-members was examined again, this time by the Ninth Circuit, in *Bugenig v. Hoopa Valley Tribe*.[32] The lower courts in *Bugenig* upheld a tribal ordinance barring logging in a buffer zone within the boundaries of the Hoopa Valley Reservation in California. This ordinance is a form of zoning for cultural resource protection, as the buffer zone was enacted to protect the sacred, spiritual, and visual integrity of traditional tribal dance sites and the trail connecting them.

Having exhausted tribal court remedies,[33] Bugenig filed suit in federal district court seeking declaratory judgment that the tribe lacks regulatory jurisdiction over her land and that the tribal court lacks subject matter jurisdiction over it as well. The district court granted the tribe's motion to dismiss on the grounds that Congress expressly granted the tribe jurisdiction over all lands within the reservation's boundaries, including Bugenig's land, in the Hoopa-Yurok Settlement Act of 1988, which provides:

> The existing governing documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary, are hereby ratified and confirmed.[34]

The existing governing documents expressly include the Hoopa Valley Tribe's Constitution,[35] which declares that the jurisdiction of the Hoopa Valley Tribe extends to all lands within the reservation boundaries and also gives the Hoopa Valley Tribal Council specific authority to:

> [R]egulat[e] the conduct of trade and the use and disposition of property upon the reservation, provided that any ordinance directly affecting non-members of the Hoopa Valley Tribe shall be subject to the approval of the Commissioner of Indian Affairs or his authorized representative.[36]

Thus, like the liquor statute and the ' 518 procedure, the statute in *Bugenig* expressly authorizes a tribal ordinance applying to nonmembers, with the precaution that federal agency approval is also required. The ' 1300i-7 delegation is unique, however, in that it relates only to exercises of civil authority by the Hoopa Valley Tribe.

The district court noted that correct construction of the Hoopa-Yurok Settlement Act is a question of law. It found no authority supporting Bugenig's contention that the phrase ratified and confirmed was ambiguous:

> The Court concludes that the plain meaning of ratified and confirmed is to give every clause in the document being ratified the full force and effect of a congressional statute. Nothing in the legislative history of the Act evinces a clearly expressed legislative intention to the contrary. . . . Accordingly, the Court

holds that ' 1300i-7 of the Act unambiguously grants each clause of the Tribal Constitution the full force and effect of a congressional statute.[37]

A three-judge panel of the Ninth Circuit Court of Appeals reversed and remanded the district court's decision on October 3, 2000.[38] Judge O'Scannlain wrote on behalf of himself and Judges Reavley and Gould, holding that because of a presumption against tribal jurisdiction over nonmembers on fee lands, any congressional delegation must be truly express. The influence of Judge Ginsberg's gold standard of delegation was clear, as the panel reasoned that if Congress uses the notwithstanding the issuance of any fee patent proviso, then an appropriate delegation of authority over fee land has been made. Any alternative formulation must, on its face, represent a pellucid delegation of the claimed authority, the panel held.

The three-judge panel opinion went on to address an issue not considered by the district court: whether the Hoopa Valley Tribe possessed inherent tribal authority to adopt and enforce the ordinance under the two *Montana* exceptions. The panel concluded that the second *Montana* exception must be narrowly construed and allows tribal jurisdiction over nonmembers only when necessary to protect self-government or control internal relations. In a footnote, the panel rejected the tribe's claim that *Brendale* supported tribal land use authority because the area at issue in *Bugenig* is dominated by tribal land ownership and the tribe maintains the right to determine the essential character of the area.

On February 28, 2001, the Ninth Circuit Court of Appeals granted en banc rehearing and prohibited further citation of the panel opinion within the Ninth Circuit pending the results of rehearing. Oral argument on the en banc rehearing has been heard, and a decision is pending.

4. Preserving Areas for Future Tribal Regulation: Direct Federal Regulation of Nonmembers Within Indian Country.

Environmental regulatory legislation adopted by Congress since about 1970 typically calls for preparation of implementation plans under state or other nonfederal law and submission of those plans to EPA for approval. Upon approval of a state implementation plan, direct federal enforcement generally ceases, subject to EPA's disapproval of a state plan, amendment, or particular permit.

Since the mid-1980s, TAS provisions have been added to several federal environmental laws under which tribes are treated as states or sovereigns. As noted above, a tribal implementation plan allows tribal enforcement and a reduced EPA role. As construed by EPA, during the period before recognition of the tribe as a State for purposes of implementation of that environmental regulatory program, this regulatory pattern makes EPA the environmental regulator on Indian lands.

a. Does "Indian Lands" Mean Indian County?

EPA's role in protecting Indian Country from state regulation and carving out that geographic area for later tribal regulation is illustrated in *Washington Dept. of Ecology v. EPA*.[39] In *Washington Dept. of Ecology*, the State proposed a RCRA regulatory program for the entire geographic area of Washington State. EPA, however, refused to approve the State's program with respect to Indian lands, which it defined to include both trust and fee lands within Indian Country. EPA's limited approval was upheld as within the authority of the agency.[40] As the following discussion illustrates, the question whether Indian lands is the same as Indian Country is sometimes unclear from the applicable statute and regulations.[41]

EPA's regulations, as amended following the addition of ' 518 to the Clean Water Act, refer to permitting on Indian lands. EPA has consistently interpreted the term Indian lands to be the same as Indian Country, which is defined in 18 U.S.C. ' 1151. EPA's equation of Indian lands with Indian Country is set forth in a number of circumstances. For example, regulations under the Safe Drinking Water Act define Indian land to be Indian Country. [42]EPA's interpretation that the term Indian lands is the same as Indian Country was upheld in *State of Washington Dept. of Ecology v. EPA*,[43] a case that involves RCRA.

Similarly, under the Clean Water Act, the regulations recognize that in many cases states will Alack authority to regulate activities on Indian lands and that AEPA will administer the program on Indian lands if a State (or Indian tribe) does not seek or have authority to regulate activities on Indian lands. [44]

EPA amended its Clean Water Act regulations to address Indian Country issues in 1993. In the Federal Register notice, EPA determined that it had never expressly authorized any State to operate an NPDES program on Indian lands even though some States have issued permits on reservations. The preamble clarified that A[w]hen [a] state-issued permit expires, EPA will reissue the permit on the Federal Indian Reservation unless the Indian tribe has been authorized to operate the NPDES program. [45] In the eight years since that regulation issued, EPA has begun to carry out its threat, to the horror of some state environmental quality agencies who feel that their State is better equipped to operate a NPDES program than is an EPA regional office. The most controversial cases are those in which the tribe has not sought TAS authority, and so the ability of EPA to preempt the application of state laws governing the conduct of nontribal members within Indian Country cannot be shown to be necessary for the purpose protecting tribal self-government. We discuss a few of these cases below.

b. Do NPDES Permits on Fee Land Always Affect Indians?

The National Pollution Discharge Elimination System (NPDES) permitting provisions of the Clean Water Act present one of the most controversial applications of EPA's authority to directly implement federal environmental laws within Indian Country prior to tribal TAS status. The controversy arises from NPDES permitting of non-Indian facilities located on fee lands within Indian Country in States where EPA has previously approved a state-wide NPDES permitting system. This controversy has led to litigation between EPA and several States.

i. Michigan: Union Township WWTP NPDES Permit.

Controversy over direct federal implementation of the NPDES program in Indian Country is illustrated by *In Re: NPDES Permit for Waste Water Treatment Facility of Union Township, Michigan*.[46] In this appeal, EPA's appeals board held that Union Township, a governmental subdivision of the State of Michigan, was required to apply to EPA for a NPDES permit for discharges from the township's new waste water treatment plant (WWTP) into the Chippewa River, located within the Isabella Reservation of the Saginaw Chippewa Tribe of Michigan.

Under the Clean Water Act, a State may submit to EPA a proposed permit program governing sources discharging to the navigable waters within the State's borders and demonstrating that the State will apply and enforce the Clean Water Act's effluent limitations and other requirements in the permits at issue.[47] Once a State has received approval for its program, EPA ceases issuing permits to the regulated sources.

The State of Michigan obtained EPA approval of its NPDES permitting program in 1973, and EPA delegated additional approval in 1978. Neither Michigan's program nor EPA's approvals mentioned areas of Indian Country within Michigan. However, EPA's 1973 approval specifically required Michigan to regulate a nearby WWTP which is also on the Reservation.

In 1999, the Michigan Department of Environmental Quality (MDEQ) gave public notice of a draft state permit for the WWTP facility. EPA objected because the WWTP is located within the exterior boundaries of the Isabella Reservation. EPA stated that Michigan may not implement its NPDES program on the reservation because Michigan did not explicitly seek, and EPA did not expressly grant, such authorization. On January 24, 2001, the Environmental Appeals Board of EPA upheld the decisions of EPA Region V. Thus, the township must obtain a federal NPDES permit for its proposed waste water discharge, notwithstanding the fact that the Saginaw Chippewa Tribe has not exercised the option of TAS status for NPDES permitting purposes within the boundaries of the Isabella Reservation. The township is also subject to the requirements of Michigan environmental law. The issues presented are currently pending before the United States Court of Appeals for the Sixth Circuit in No. 01-3534. Briefing will be complete in November 2001.

ii. Nebraska: Walthill and Pender WWTP NPDES Permits.

EPA's authority to directly implement the NPDES permitting program is also in litigation in EPA Region VII, involving the reservation of the Omaha Tribe of Nebraska and Iowa. On April 13, 2001, EPA Region VII affirmed its objections to proposed permitting of the Nebraska Department of Environmental Quality for the Walthill and Pender waste water treatment plants, which are located within the exterior boundaries of the Omaha Reservation. EPA held that because the discharges for these facilities are located within the boundaries of the reservation, EPA retains authority and responsibility to issue NPDES permits because Nebraska has not been authorized to issue such permits within the reservation, and the Omaha Tribe has not applied for or received authority to issue NPDES permits within its reservation.

The State of Nebraska contended that EPA correspondence in 1975 supported Nebraska's claim that its NPDES program applied within the Omaha Reservation. The correspondence revised Nebraska's NPDES program to include issuance of the permit for the Village of Winnebago on the Winnebago Indian Reservation. The 1975 decision attached an opinion of Regional Counsel, which relied upon Public Law 280. Since Regional Counsel did not then have the benefit of the United States Supreme Court's decision in *Bryan v. Itasca County*,[48] which held that Public Law 280 did not give States civil regulatory authority over Indians within Indian Country, EPA refused to follow its *Village of Winnebago* decision. Thus, although in 1974 EPA approved Nebraska's request to administer the NPDES program within the State, this approval did not grant Nebraska authority to administer the NPDES program within Indian Country. It is not clear that EPA's objections to state permitting of the Walthill and Pender facilities is currently judicially reviewable. EPA takes the position that until EPA issues an NPDES permit for the facilities, no appeal can be heard.

c. Safe Drinking Water Act Jurisdiction.

EPA's direct implementation of the Safe Drinking Water Act (SDWA) is also controversial, although in that statute EPA's authority is clearer than the Clean Water Act. In *HRI, Inc. v. EPA*,[49] a mining company and the New Mexico Environment Department petitioned for judicial review of EPA's decision to directly implement federal underground injection controls on certain New Mexico lands pursuant to the Safe Drinking Water Act. The Tenth Circuit first held that EPA's reconsideration of a prior determination that certain lands were Indian Country for SDWA purposes was a new decision triggering a new limitation period. The court concluded that EPA acted reasonably in asserting jurisdiction over the disputed lands under regulations providing for non-substantial UIC program revisions; that EPA could find that federal Indian Country status of lands was disputed despite prior state adjudications to the contrary; and that one of the land parcels at issue qualified as Indian Country. Accordingly, direct federal implementation was sustained.

d. Avoiding the Litigation: Regulatory Agreements.

Who will prevail? States generally have very broad civil and criminal authority over nontribal members within Indian Country. As the Cohen treatise says:

> The scope of preemption of state laws in Indian country generally does not extend to matters having no direct effect on Indians, tribes, their property, or federal activities. In these situations, state courts have their normal jurisdiction over non-Indians and their property, both in criminal and civil cases.
>
> When transactions or events in Indian country involve both Indians and others, competing claims of state, federal, and tribal jurisdiction arise . . . . [C]ases against Indian defendants are generally preempted from state jurisdiction by

> federal protection of tribal self-government. The matter is more complex when the defendant is not an Indian.
>
> . . .
>
> Absent a governing federal statute, the Supreme Court has stated that in controversies where both Indians and non-Indians are involved the State could protect its interest up to the point where tribal self-government would be affected. [50]

In support of these principles, the Cohen treatise cites many cases.[51]

However, tribes also have a strong argument for asserting authority. State environmental laws and regulations within Indian Country usually have a direct effect on Indians, tribes, their property, or federal activities. But whether such an effect exists is a factual question. Similarly, whether the tribe has adopted its own environmental regulations is a factual question. A conflict in state and tribal regulations may lead to a finding of interference with tribal self-government.

It is perfectly appropriate for tribes to enter into agreements with States and provide for continuation of well-managed state regulatory programs in the absence of a tribal finding of an adverse effect on Indians, tribes, or their property. Where such an agreement has been made, the tribe may choose not to adopt its own regulatory program. Thus, implementation of the state program would not interfere with tribal self-government. It can be argued that, in such cases, the state environmental agency and state courts would have their normal jurisdiction over non-Indians and their property within such an area of Indian Country. An agreement to let the State apply its environmental regulations to non-Indians operating on fee land may also avoid a dispute between the tribe and the State over reservation boundaries; that is, over whether the lands are within Indian Country at all.[52] Whether EPA is flexible enough to recognize such agreements for NPDES permits remains to be seen.

5. The *Atkinson* and *Hicks* Decisions Underscore the Need for Congressional Authorization of Tribal Regulatory Authority.

The wisdom of entering jurisdictional agreements for environmental regulation and enforcement is underscored by the Supreme Court's two most recent decisions applying the *Montana* exceptions. These opinions, which we discuss briefly below, increase the difficulty tribes will have supporting environmental regulation on an inherent sovereignty basis.

Atkinson Trading Co., Inc. v. Shirley[53] rejected the Navajo Nation's claim that inherent sovereignty supported imposition of a hotel occupancy tax upon nonmembers on non-Indian fee land within its reservation. The Court analyzed the first and second *Montana* exceptions and held them inapplicable. The Court rejected broad language in *Merrion v. Jicarilla Apache Tribe*[54] and earlier cases and found the analysis of *Brendale* to be inapplicable because the effects of the trading post did not endanger the Navajo Nation's political integrity.

In *Atkinson Trading*, a non-Indian hotel proprietor sued members of the Navajo Tax Commission seeking a declaratory judgment that the Navajo Nation had no jurisdiction to impose an hotel occupancy tax on the proprietor's guests. The New Mexico District Court entered summary judgment in favor of the commission members. Atkinson Trading appealed. The court of appeals held that: (1) district courts in reviewing tribal court decisions on jurisdictional issues should review findings of fact for clear error and conclusions of law de novo; (2) the district court did not abuse its discretion in finding that Navajo tribal courts were not fundamentally unfair or biased, and that clear error deference thus should be given to the tribal courts' findings of fact; (3) the fact that the hotel was situated on fee land did not compel a finding that the Nation lacked jurisdiction over the proprietor's nonmember guests; (4) the district court applied the appropriate test for determining whether the proprietor entered into a consensual relationship with the Navajo Nation; and (5) a consensual relationship existed between Nation and guests, such that Nation had inherent jurisdiction to tax. Circuit Judge Briscoe dissented.[55] On petitions for rehearing, the court of appeals split evenly, so rehearing was denied.

The Supreme Court's unanimous opinion reversing made no comment on the standards for reviewing tribal court decisions but rejected the Tenth Circuit's finding of consensual relationships between the Navajo Nation and the hotel guests or the trading post. As Justice White had noted in *Brendale*, the Court stressed that *Atkinson Trading Post* involved no claim of statutorily conferred power.[56] The Court noted that neither the Indian Trader's Statute[57] nor the regulations adopted under that statute, authorized the hotel occupancy tax at issue.[58] The *Atkinson Trading Post* opinion thus eliminates the argument that providing the benefits of a civilized society to nonmember businesses and individuals within Indian Country might support tribal inherent civil regulatory authority over nonmembers. That disappointing reading of *Atkinson Trading Post* was reinforced by the U.S. Supreme Court's other major 2001 decision limiting tribal authority, *Nevada v. Hicks*.

State of Nevada v. Hicks[59] involved an action by a tribal member against state officials in their individual capacities arising from tort and civil rights violations while executing a search warrant on Indian-owned reservation land. Judge Betty Fletcher, for a divided appellate panel, upheld tribal court jurisdiction. Carefully analyzing *Strate v. A-1 Contractors*,[60] the Ninth Circuit found that the Supreme Court had expressed no view on the governing law or proper forum when an accident occurs on tribal land within a reservation.[61] The *Strate* court emphasized that the decision in *Montana* related to reservation land acquired in fee simple by non-Indian owners. [62] Judge Fletcher explained that the Ninth Circuit's post-*Strate* opinions Aare consistent with evolving Supreme Court precedent that stresses membership and rights of land ownership as sources of tribal power. [63] Here, she reasoned:

> Unlike *Montana*, *Strate*, *Wilson*, *County of Lewis*, and *King* the incidents underlying the instant case occurred on Indian-owned, Indian-controlled land, over which the tribe retained its right to exclude non-members. In the absence of federal statutes limiting it, the Tribe has exclusive criminal jurisdiction in Indian Country over minor crimes committed by Indians. . . .

> Unlike the Agreement in *County of Lewis*, the warrant in this case bestows no broad grant of authority upon the State of Nevada. The tribe retains sovereignty over the land upon which the search and seizure took place. The land on which Hicks' residence stood was neither open to the public, nor controlled or maintained by any entity other than the tribe . . .
>
> We find that the *Montana* presumption against tribal court jurisdiction does not apply in this case. Instead, in line with *Strate* and *County of Lewis*, we look to the tribe's power to exclude state officers from the land at issue. The tribe's unfettered power to exclude state officers from its land implies its authority to regulate the behavior of non-members on that land.[64]

The Supreme Court reversed and filed five opinions.[65] All Justices agreed that the Ninth Circuit erred. Justice Scalia's opinion for the Court began with the facile equation from *Strate* that tribal adjudicative jurisdiction does not exceed tribal legislative jurisdiction.[66] He then noted that tribes do not necessarily have regulatory authority over nonmembers on tribal land because *Oliphant* did not rely on land status.[67] *Brendale*, he found, is the only case in which the Court has approved inherent tribal authority over a nonconsenting nonmember's fee land.[68] Justice Scalia then reasoned that States have authority over crimes committed off reservation and deduced that tribal authority over officers asserting state investigative power is not necessary for tribal self-government.[69] He decided that exhaustion was unnecessary by admittedly broadening the exception that exhaustion is not required where it would serve no purpose other than delay.[70] Finally, he devoted five pages to saying Justice O'Connor had exaggerated his opinion.

Justice Souter wrote for himself, and Justices Kennedy and Thomas, saying that the tribal court lacked jurisdiction, but they would reach the result more directly by simply extending the *Montana* main rule and exceptions to tribal land.[71]Thus, the main rule that tribes lack inherent civil authority over *nonmember* fee land is now the main rule for *all* land. It would seem to follow that the *Strate* Court's inquiry into whether rights of way can be A aligned with fee land for jurisdictional purposes was pointless.

Justice Ginsburg filed a separate short opinion to emphasize that the Court was only deciding the question of tribal court jurisdiction over state officers enforcing state law.[72]

Justice Stevens and Justice Breyer joined the Court's opinion except its conclusion that tribal courts cannot enforce claims under 42 U.S.C. 1983.[73] Justice Stevens points out that the majority has it backwards, in looking for a statute that authorizes tribal courts to hear such claims, when the real question was whether Congress has said tribal courts should not hear such claims.

Finally, Justice O'Connor (with Stevens and Breyer) agreed with Justice Scalia's opinion, but declared that Part II of the Court's opinion is unmoored from our precedents. [74] Thus these three Justices joined Justice Scalia in declaring that *Montana's* main rule and exceptions governs all reservation lands. However, Justice O'Connor was concerned that the Court had given too little emphasis to tribal land status as a factor to consider in applying

the *Montana* exceptions. Justice O'Connor evidently believed a consensual relationship may be found in the *Hicks* facts, for purposes of the *Montana* first exception. Nevertheless, she argued that the Ninth Circuit erred in refusing to address the officers' immunity defenses.[75]

Justice O'Connor also noted that some state-tribal agreements can confer tribal court authority even if the process of getting a search warrant did not do so in this case.[76] Her opinion, as well as Justice Scalia's opinion, emphasizes that the tribe's authority was not founded on a congressional authorization or delegation of power.

6. Conclusion.

Congressional statutes that reflect an intention to ratify, confirm, reaffirm, or otherwise enable the exercise of tribal territorial jurisdiction, or other specific authorities, already exist. The Supreme Court has not suggested that the express delegation standard will be rigidly applied. Using congressional authorization as a basis for tribal exercises of authority may reverse or slow the erosion of the inherent tribal sovereignty doctrine in the federal courts.

In our view, in light of the narrowing of the *Montana* exceptions, the only reliable basis for environmental enforcement on tribal lands is through congressional authorization or delegation. Through a judicious combination of clarifying its regulations or seeking amendments as necessary to broaden the TAS process in federal environmental laws, EPA can help tribes assure adequate environmental enforcement occurs on tribal lands. The TAS procedures differ from one federal environmental statute to another. Clearer law is needed.

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[1] 450 U.S. 544 (1981).

[2] E.g., Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997) (characterizing Montana as the pathmarking case on the subject of tribes' regulatory jurisdiction over nonmembers).

[3] Id. at 564-66.

[4] 440 U.S. 544 (1981).

[5] Atkinson Trading v. Shirley, ___ U.S. ___, 121 S. Ct. 1825 (May 29, 2001); Nevada v. Hicks, ___ U.S. ___, 121 S. Ct. 2304 (June 25, 2001).

[6] 419 U.S. 544 (1975).

[7] The court of appeals in Mazurie expressed doubt that Congress has power to regulate businesses on non-Indian fee land. Part III of the Supreme Court's opinion dismissed that doubt on the basis of the Indian Commerce Clause and the string of cases involving sale of alcoholic beverages to tribal Indians whether on or off a reservation. Mazurie, 419 U.S. at 554.

[8] Id. at 557 (emphasis added).

[9] In City of Timber Lake v. Cheyenne River Sioux, 10 F.3d 554 (8th Cir. 1993), cert. denied, 114 S. Ct. 2741 (1994), the court relied on ' 1161, as construed in Rice v. Rehner, 463 U.S. 713 (1983), as authority for tribal regulation of liquor throughout the reservation with no exemption for non-Indian communities. Thus, while the reference to non-Indian communities at issue in Mazurie would affect federal criminal prosecutions, it would not limit the tribal civil jurisdiction over nonmembers authorized by ' 1161.

[10] Where tribal authority is based on a federal statute or a treaty, the issue arises whether the tribe is exercising delegated federal authority or Are-authorized tribal authority. The language of the Supreme Court's previous opinions is equivocal. Compare Montana, 450 U.S. at 562 (Congress could extend tribal jurisdiction to non-Indian land) with Mazurie, 419 U.S. at 554 (Congress delegated its authority to control alcohol in Indian Country). In the context of double-jeopardy and 25 U.S.C. ' 1301(2) (the Duro amendment), the Ninth Circuit has held that Congress has the power to reaffirm former tribal criminal jurisdiction over nonmember Indians. United States v. Enas, 255 F.3d 662 (9th Cir. 2001). Where the statutory language permits, construing federal statutes as affirming inherent tribal authority as opposed to delegating federal authority properly acknowledges tribal sovereign status as well as avoids issues concerning technical delegations.

[11] 450 U.S. 544 (1981).

[12] United States v. Montana, 604 F.2d 1162, 1167 (9th Cir. 1979).

[13] Montana, 450 U.S. at 562.

[14] Mazurie, 419 U.S. at 557.

[15] 492 U.S. 408 (1989) (upholding, by deeply divided Court, tribal exclusive zoning power in a portion of the reservation dominated by tribal ownership and rejecting inherent tribal power to zone lands in another part of the reservation that was largely fee land and populated by non-Indians).

[16] Id. at 428.

[17] 18 U.S.C. ' 1161.

[18] See Final Rule, 58 Fed. Reg. 67,966 to 67,970-71 (Dec. 22, 1993).

[19] 137 F.3d 1135, 1138 (9th Cir. 1998).

[20] Id. at 1141.

[21] 941 F. Supp. 945 (D. Mont. 1996). See generally A. Skibine, The Chevron Doctrine in Federal Indian Law and the Agencies' Duty to Interpret Legislation in Favor of Indians: Did the EPA Reconcile the Two in Interpreting the Tribes As States Section of the Clean Water Act?, 11 St. Thomas L. Rev. 15 (1998); R. Cross, When Brendale Met Chevron: The Role of Federal Courts in the Construction of An Indian Environmental Law, 1 Great Plains Nat. Resources J. 1 (1996).

[22] 211 F.3d 1280 (D.C. Cir. 2000), cert. denied, 121 S. Ct. 1600 (2001).

[23] See Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254 (1998) (to be codified at 40 C.F.R. pts. 9, 35, 49, 50, and 81).

[24] 42 U.S.C. ' 7410(o).

[25] 42 U.S.C. ' 7601(d)(1)(B).

[26] Arizona Public Service Co., 211 F.3d at 1303.

[27] 42 U.S.C. ' 6903(31).

[28] 42 U.S.C. ' 6903(13).

[29] See 42 U.S.C. ' 6948, 6972; Blue Legs v. U.S. Bureau of Indian Affairs, 867 F.2d 1094, 1097 (8th Cir. 1989).

[30] 100 F.3d 147 (D.C. Cir. 1996).

[31] 100 F.3d at 150.

[32] No. C 98-3409 CW (N.D. Cal. Mar. 31, 1999), appeal pending, 9th Cir., No. 99-15654.

[33] E.g., Hoopa Valley Tribe v. Bugenig, 25 Indian L. Rep. 6137 (Hoopa Valley Tr. Ct. July 11, 1996); Bugenig v. Hoopa Valley Tribe, 25 Indian L. Rep. 6139 (Hoopa Valley S. Ct. April 23, 1998).

[34] 25 U.S.C. ' 1300i-7.

[35] 25 U.S.C. ' 1300i(b)(4).

[36] CONSTITUTION AND BYLAWS OF THE HOOPA VALLEY TRIBE, art. IX, ' 1(l) (approved as amended June 18, 1996).

[37] Bugenig v. Hoopa Valley Tribe, No. C 98-3409 CW, slip op. at 8 (N.D. Cal. Mar. 31, 1999); available at http://www.msaj.com/cases/bugenig.htm.

[38] Bugenig v. Hoopa Valley Tribe, 229 F.3d 1210 (9th Cir. 2000), en banc granted, 240 F.3d 1215 (9th Cir. 2001).

[39] 752 F.2d 1465 (9th Cir. 1985).

[40] See also Arizona v. EPA, 151 F.3d 1205 (9th Cir. 1998), as amended, 170 F.3d 870 (9th Cir. 1999) (air quality regulation geographic scope).

[41] There is no single definition of Indian Country. However, the definition found in 18 U.S.C. ' 1151, which includes all lands (including fee lands) within Indian reservations, dependent Indian communities, and Indian allotments to which Indians own title, is the broadest definition. The ' 1151 definition is also found in ' 518 of the Clean Water Act. See 33 U.S.C. ' 1377(h)(l). The Supreme Court has stated that the statute's definition generally applies also to questions of federal civil jurisdiction and to tribal jurisdiction. E.g., DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 478-79 (1976). A narrower definition applies for federal criminal purposes under the liquor statutes. 18 U.S.C. ' 1154(c).

[42] 40 C.F.R. ' 144.3.

[43] 752 F.2d 1465, 1567 n.1 (9th Cir. 1985).

[44] 40 C.F.R. ' 123.1(h).

[45] 58 Fed. Reg. 67,968.

[46] NPDES Appeal Nos. 00-26 & 00-28 (EAB 2001).

[47] See 33 U.S.C. ' 1342(b); Ames, Iowa v. Reilly, 986 F.2d 253, 254 (8th Cir. 1993); Save the Bay, Inc. v. EPA, 556 F.2d 1282, 1285 (5th Cir. 1977).

[48] 426 U.S. 373 (1976).

[49] 198 F.3d 1224 (10th Cir. 2000).

[50] Felix S. Cohen's Handbook of Federal Indian Law 352-55 (Renard Strickland ed., 2d ed. Michie 1982) (footnotes omitted). See also id. at 264-66.

[51] E.g., United States v. McBratney, 104 U.S. 621 (1882); Utah & N. Ry. v. Fisher, 116 U.S. 28 (1885); Thomas v. Gay, 169 U.S. 264 (1898); Surplus Trading Co. v. Cook, 281 U.S. 647, 651 (1930) (dictum); Williams v. Lee, 358 U.S. 217 (1959); and Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685 (1965).

[52] South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998), originated in a dispute over whose solid waste regulations applied. The case resulted in a holding that the lands were no longer part of the Yankton Sioux Reservation and therefore state regulations governed.

[53] ___ U.S. ___, 121 S. Ct. 1825 (May 29, 2001).

[54] 455 U.S. 130 (1982).

[55] Atkinson Trading Post, 210 F.3d 1247 (10th Cir. 2001).

[56] 121 S. Ct. at 1832 n.5.

[57] 25 U.S.C. ' 261.

[58] Atkinson Trading Post, 121 S. Ct. at 1833 n.10.

[59]___ U.S. ___, 121 S. Ct. 2304 (June 25, 2001).

[60] 520 U.S. 438 (1997).

[61] Id. at 442.

[62] Id. at 446.

[63] 196 F.3d at 1026 (citations omitted; amended opinion at http://laws.findlaw.com/9th/9617315v2.html).

[64] 196 F.3d at 1027-28.

[65] Nevada v. Hicks, __U.S. __, 121 S. Ct. 2304 (June 25, 2001).

[66] Id. at 2309.

[67] Id. at 2310.

[68] Id.

[69] Id. at 2311.

[70] Id. at 2315.

[71] Hicks, 121 S. Ct. at 2318.

[72] Id. at 2324.

[73] Id. at 2332.

[74] Hicks, 121 S. Ct. at 2324.

[75] Id. at 2332.

[76] See id. at 2328.